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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. ...770

MARGARET JOHNSON, as Administratrix of the Goods, Chattels and Credits of CHARLES JOHNSON, deceased,
Petitioner,

against

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Margaret Johnson, as administratrix of the goods, chattels and credits of Charles Johnson, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled matter on February 7th, 1955.

Opinions Below

The opinion of the District Court is not officially reported and is reproduced in the Transcript of Record (R. pp. 143-148). The decision of the Court of Appeals was filed on February 7, 1955. It affirmed on the opinion of the District Court and is reproduced in the Transcript of Record opposite page 154.

Jurisdiction

The action was brought under the Jones Act (46 U. S. C. 688, claiming damages for wrongful death.

The judgment of the Court of Appeals sought to be reviewed was rendered on February 7, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254, subdivision (1).

The Prior Appeal in This Court

On a previous petition for a writ of certiorari granted to petitioner this Court restricted the review of the decision of the Court of Appeals for the Second Circuit to a procedural point involved. This Court vacated the prior judgment of the Court of Appeals in favor of the defendant and remanded the cause for a new trial upon the ground that the defendant had failed to move to set aside the jury verdict under Rule 50(b) of F. R. C. P. (344 U. S. 48).

Basis for the Courts Below Setting Aside the Jury Verdict

The decision of the District Court in setting aside the second jury verdict seemed to be largely influenced by this Court limiting the argument to a procedural question, and deciding the case upon that question. Implicit in the opinion of the court below (District Court) is that the Court of Appeals committed no error in reversing plaintiff's prior judgment on the merits on the question of causal relationship between the negligence found and the decedent's death (R. 444). The Court of Appeals agreed with such holding

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by adopting the opinion of the District Court (R. opposite page 154).[1]

The basis upon which the court below substituted its decision of causal relationship for that of the jury does not seem to be in accord with the intent of Congress giving seamen and railroad employees the right of trial by jury.[2]

Questions Presented

1. Was the lower court unduly influenced by the Supreme Court's limiting the review on the previous appeal to the procedural question.

2. Was the Court of Appeals for the Second Circuit justified in adopting its own inference on causal relationship for that found by the triers of the facts—the jury?

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[1] The simple denial of a writ is not intended to intimate opinion by the Court either as to its jurisdiction over the case, or as to its merits. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case as the bar has been told many times (*U. S.* v. *Carver*, 260 U. S. 487; *Atlantic Coast Line R.R. Co.* v. *Powe*, 283 U. S. 401, 403-404).

On previous occasions the Court had granted writs for the purpose of deciding the question of the interpretation of Rule 50(b) of the F.R.C.P. Nevertheless, the Court reversed on the merits without ever considering the procedural point involved (*Conway* v. *O'Brien*, 312 U. S. 492; *Berry* v. *U. S.*, 312 U. S. 450; *Halliday* v. *U. S.*, 315 U. S. 94).

[2] In death cases where there is a paucity of direct testimony, and where plaintiff's case is based largely upon circumstantial evidence and reasonable inferences therefrom, the question of proximate cause is peculiarly one for the jury's determination. Interference with a jury holding by courts has been criticized as an "independent resolution of conflicting testimony"

Wilkerson v. *McCarthy*, 336 U. S. 53;
Lavender v. *Kurn*, 327 U. S. 645;
Tennant v. *Peoria & P. Ry. Co.*, 321 U. S. 29, p. 34;
Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 645.

Statutes Invoked

Title 28, U. S. C., Sec. 1254.
Title 46, U. S. C., Sec. 688, Jones Act.
Title 45, U. S. C., Sec. 51, F. E. L. A.

Summary Statement of the Matter Involved

This is an action for wrongful death under the Jones Act brought by the widow of a deceased merchant seaman, on behalf of herself and her two minor children.

The decedent, Charles Johnson, was a member of the crew of the tugboat "Transfer No. 10", who met his death by drowning when the vessel was negligently navigated at a railroad yard pier at Oak Point, County of Bronx, City of New York.

There were two trials before the United States District Court for the Eastern District of New York. The first one resulted in a jury verdict in favor of the plaintiff in the sum of $20,000, and judgment on said verdict was entered in the office of the Clerk of said United States District Court on the 20th of June, 1951 in favor of petitioner against the New York, New Haven and Hartford Railroad in the sum of $20,183.33. The Court of Appeals for the Second Circuit reversed the judgment and directed a judgment for the defendant on February 4, 1952 (194 F. 2d 194).

The Court of Appeals in reversing the judgment did not disturb the jury's findings of negligence in the operation of the tug, which consisted of pulling away from the bridge, before the captain of the tug had ascertained that Johnson was in a position of safety. However, the Court held that there was not sufficient evidence of causal relationship, in that Johnson's fall from the float and his subsequent death may have been due to "some other unknown cause" and di-

rected that a verdict be entered for the defendant (191 F. 2d 194, p. 197).

This Court reversed the decision of the Court of Appeals and remanded the case for a new trial (344 U. S. 48).

The second trial again resulted in a verdict in favor of the plaintiff in the sum of $25,000. The District Court felt constrained by the opinion of the Court of Appeals (R. 444) to set aside the verdict and direct a judgment for the defendant, upon the sole ground that the proved negligence was not the cause of decedent's death. Not only was this a new trial, as ordered by this Court, but in effect it was a different trial and added a great deal more probative facts on the question of causal connection.

Specifications of Error To Be Urged

The learned Court of Appeals for the Second Circuit erred in the following respects:

(1) In giving undue weight to this Court's previous review of the first trial.

(2) In feeling itself bound by its decision on a previous appeal and in failing to review the additional evidence of causal relationship adduced at the second trial.

(3) In holding that there was not sufficient evidence to justify the jury's finding of causal relationship between the negligence found and the death of decedent.

(4) In substituting its own inference of proximate cause for that found by the jury and thereby depriving petitioner of a jury trial.

(5) In affirming the judgment of the District Court.

Statement

The decedent, Charles Johnson, a member of the crew of the tugboat "Transfer No. 10", met his death by drowning when the vessel was engaged in an operation of moving two railroad floats from one mooring to another at this railroad yard at Oak Point, County of Bronx, City of New York.

The accident occurred on April 22, 1946, and on the following day, April 23rd, the defendant conducted an investigation into the causes leading to Johnson's drowning, by its Captain Agan. Both Captain O'Brien of the tug and the mate, Gaglio, gave comprehensive testimony as to the circumstances (32, 35, 75). Significantly enough, that testimony highlighted three definite causes of Johnson's death:

1. That O'Brien started ahead *before* the all-important "all gone" signal was given that all lines were cleared (R. 118).

2. That when the signal was given, it was not recognized as coming from Johnson, the floatman (R. 159-160).

3. That one of the floats which Johnson had to traverse in his work was "saturated with oil" (R. 75-76).

Plaintiff, perforce, was compelled to call both Captain O'Brien and Gaglio as her witnesses, despite the fact that they were still employees of the defendant, and particularly despite the fact that one of them, Captain O'Brien, was actually charged with negligence that caused the floatman's death.

While it is true that nobody saw Johnson fall into the water, it is plaintiff's position that the evidence could lead only to one inference—i.e., that the combination of circumstances, of Captain O'Brien starting ahead, at an improper time, together with the presence of oil on one of the barges, was the cause of Johnson's death. Decedent's body was

found floating at the point where the floats had been secured to the bridge (39-40, 131). The Transcript of Record opposite pages 130 and 132 shows photographs of the bridges and the two car floats involved in the accident.

The empty car floats which the tug removed from the Oak Point Yard were numbered 53 and 58. Car float 53 was secured to bridge 11 and car float 58 to bridge 12, and each one of them was lying bow in (54-56). Each car float is 340 feet in length and 40 feet wide. Between the two bridges, 11 and 12, was a pier about 50 feet long, referred to in the testimony as the "short rack". On the outer side of the two bridges were long piers, known as "long racks". The two floats were secured to the short rack by lines called "short racklines" and to the long pier or long rack by "long racklines" (55-58). In the operation of removing the floats from its moorings to the slip or bridges, the floatman (Johnson) unties the short racklines, while bridgemen on the long rack flip off the long racklines (R. 69-70, 97, 103-104). When the tug came alongside of float 53, the mate, Gaglio, and deceedent, Johnson, stepped aboard float 53 (60). Gaglio went towards the stern of the float, so as to secure at the stern the two floats when they were pushed together by a maneuver of the tug. Johnson went towards the bow, as his duty was to remove the short rackline on float 53 (the one that was saturated with oil), and then step across to the other bridge, where he was required to remove the short rackline on the 58, and then secure the two floats to each other, once they cleared the short rack, so that when the tug finally pulled out, the two floats would be secured at the bow by Gaglio, and at the stern by Johnson (58-60, 89).

The last time that Johnson was seen alive was when he walked on the 53 towards the bow (61). Concededly, he did remove the short rackline on the 53. Concededly, he crossed over to bridge 12 and was on the 58 at some time before the accident. Concededly, the captain's view of the port bow was obstructed by the short rack, so that he could not see

Johnson's operation (*Johnson* v. *N. Y., N. H. & H. R. Co.*, supra at p. 197).

The captain has a clear view of every other part of the float with the exception of the port bow heretofore indicated. Not having a proper view, the captain relies on a customary signal from *Johnson* of "all gone" before pulling away from the bridge (159, 183). *Both the mate and the captain admit that while they heard someone holler "all gone", they did not know that it was Johnson, and furthermore, Captain O'Brien admits that it could have been one of the bridgemen* (159-160). *The "all gone" signal is not only used by the floatman (Johnson) but also by bridgemen* (97).

The danger of proceeding ahead until the captain ascertains the source of the signal, was forcefully described not only by the experts called by both sides, consisting of retired tug captains, but by the defendant's captain, who was charged with the negligence involved (212, 338, 346-347). Unlike the long rackline, with an eye that is flipped off by a bridgeman (166), the short rackline is actually tied around the bitts by snake loops, or turns which required Johnson to *unwind the line* (92-94). There being no eye-witnesses, no one knows, of course, at what moment in the process of unwinding, the float started to pull ahead. *Without actually knowing that Johnson gave the signal and was in a position of safety, the danger in starting to pull away from the bridge is that the man on the line may get tangled up in the line, either by getting his hands or his feet caught, and thereby fall overboard* (212, 185-186).

The Additional Testimony on the Second Trial

Upon the first trial, an attempt was made to prove that one of the floats was covered with oil. That was ruled out on that trial. This time the evidence showed that when Gaglio, the mate, followed by Johnson, the floatman, boarded car float 53, there was an accumulation of oil at the stern

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end of the float, having a diameter, according to the mate, of some 25 feet (75-76, 80-81, 83-84, 86, 88, 179).

> "A. *On 53 it was saturated with oil.* The stern of it. *I took a couple of slips on it. The second deckhand complained about the oil on the 53 on the stern*" (75-76).

Whether the presence of the oil made the vessel unseaworthy, or to use the common-law expression, an unsafe place, is really not overly important. Chief Judge Learned Hand in *McGee* v. *U. S.*, 165 F. 2d 287, at page 290, called it by perhaps a more appropriate term as "negligent unseaworthiness". Captain O'Brien testified that the source of the oil on the float was leakage (179). These floats were entirely under the control of the defendant, and were tied up to the bridges for some time. Obviously the defendant's crews, which had something to do with the securing of the floats to the bridges long before they were removed, certainly must have had plenty of opportunity to observe this oil.

The mate described the patch of oil as some 40 or 50 feet from the stern (80-81, 83-86); O'Brien placed it about 100 feet from the stern (179). Although Johnson was not seen to slip while still on the 53, undoubtedly in traversing the oil-covered deck of the 53, he must have stepped into part of that oil, so that his shoes became covered with it, and made his footing insecure when he finally reached the 58. That is a fair inference.

Johnson was missed from the float after they cleared the short rack and had pulled away from bridges 11 and 12 some 50 feet (121). It was and still is petitioner's claim that while Johnson was engaged in loosening the turns around the bitt on Float 58, and before he had entirely completed clearing the line, the float started forward before he had given the signal which signified that all was well, and because of the additional factor that his shoes must have been covered with oil, he was caught by the line and thrown forward, striking his head, as was indicated by

the mark on his forehead (R. 247, 266, 270), and thrown into the water at the point where the float pulled away from the bridge.

The trial court submitted to the jury the issues of negligence in the operation of the tug as well as the presence of the oil on one of the floats, and particularly emphasized and stressed that the jury must find that such negligence was the proximate cause of Johnson's death, before plaintiff could recover (363-365).

The jury found in favor of petitioner.

Captain O'Brien's knowledge that Johnson was not on the float was indicated when he directed the mate to do that part of Johnson's job which required him to secure the two floats to each other by a line at the port bitts (106, 122, 161). With strange cynicism the tug proceeded ahead, completed the operation of securing the floats at the Gates Pier, some few hundred feet away, and then returned (106, 127-130). A belated search was then instituted for Johnson, *and his body was found floating at bridge 12 at the very point where the short rackline was found hanging from the rack* (142). Attempts at resuscitation failed, and death was ascribed to drowning (Plff. Ex. 8, p. 138).

Reasons for Granting the Writ

(1) Both courts below gave greater import to this Court's limiting the argument to a procedural point, than is warranted.

The District Court in setting aside the jury verdict believed that it was compelled to do so by the previous opinion in the Court of Appeals that had found insufficient evidence of causal relationship (R. 444). In sustaining the District Court, the Court of Appeals merely stated that the present case was free from the procedural defects and affirmed on the opinion of the District Court. Both courts refer to the

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fact that this Court in granting certiorari restricted argument to the procedural question (Dist. Ct., R. 444; Ct. of Ap. R. opp. p. 154).

It is difficult to disassociate the fact that undue weight was ascribed to the action of this Court in limiting certiorari.

Here we have an endless circle which deprived the petitioner of her verdict. The District Court feels itself compelled to set it aside because of the previous review of this case by the Court of Appeals. The Court of Appeals affirms by adopting the opinion of the District Court and both of them suggest that there is no more error once the procedural defect has been cured.

The District Court by charging the jury in the verbatim language of the Court of Appeals, in its decision as to lack of causal relation on the first trial, was in effect saying that this finding must necessarily follow in the second trial (R. 364-5). Notwithstanding the jury's verdict for plaintiff despite this charge, the District Court set aside the verdict in an opinion in which explicit reference is made to the fact that this Court had granted certiorari only on a procedural point, the inference being that there was approval by this Court, on the merits. When there is added to this coupling of the circumstances on the prior appeals, the further fact that the Court of Appeals adopted the District Court's opinion as its own, in affirming the setting aside of the second jury verdict, we arrive at the inescapable conclusion that plaintiff has been deprived of any genuine review of the merits of the second trial and in effect, therefore, has been deprived of a jury trial.

Any other conclusion would indicate that this Court, by sending the case back for a new trial, was doing so merely and solely for the purpose of having defendant make a proper motion to set aside the verdict. *We cannot believe that petitioner was compelled to go through another trial*

so that defendant could correct a procedural error. The granting of a new trial was no mere formality; neither was it an idle gesture!

(2) The lower courts failed to give due weight to the additional testimony as to causal relationship, in the new trial which was ordered by this Court.

Both courts utterly failed to distinguish the vast difference between the two trials. In the first, the presence of bridgemen that could have given the signal was not made too clear. In the second trial that was firmly established. In the first trial no evidence was permitted on the question of the slippery condition of one of the floats. This time, such evidence tended strongly to show one of the reasons for Johnson's falling off the float.

By its verdict the jury drew, we believe, a fair inference of the two factors of negligence in deciding whether or not either one or both caused Johnson's death.

As against this logical and fair inference, both courts found as an "independent resolution" that Johnson gave the all-important signal. That inference by the courts was based on pure conjecture without any facts to buttress such conclusion.[3]

Having come to that conclusion, the court then has no difficulty in finding that there was a lack of evidence as to causal relationship.

Of course petitioner's position that Johnson most likely fell off the float while he was unwinding the short rackline, is not based on direct proof. Nobody saw him fall. There is no certainty that what petitioner claims, is exactly what

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[3] Theories cannot be presumed as a basis for drawing inferences (*Chicago M. & St. Paul Ry. Co. v. Coogan*, 271 U. S. 472). Even if it was a permissible inference and contrary to that of jury, that does not authorize the Court of Appeals in reversing (*The Niel Maersk*, 91 F. 2d 932).

happened. Litigated issues are seldom established to a certainty, as stated by Judge Cardozo in his own inimitable way. He said that the quest for certainty is vain and futile. The law contents itself with probabilities and declines to wait for certainty before drawing its conclusions. *Lewis* v. *Ocean Accident & G. Corp.*, 224 N. Y. 18, 21-22. The inference to be drawn from the circumstances of the negligence in the operation need not be certain or uncontrovertible. Different minds may well come to different conclusions. That is why it is for the jury to decide and not the court. *Hart* v. *Hudson River Bridge Co.*, 80 N. Y. 622. It is equally well established that proof of defendant's negligence does not mean that plaintiff's evidence must exclude or eliminate every other possible cause or point out the particular act or omission which caused the injury. *Rosenberg* v. *Schwartz*, 260 N. Y., 162, 166; *Ingersol* v. *Liberty Bank*, 278 N. Y. 1.

The Court of Appeals, commenting upon the first trial, held that the jury, having found that the defendant violated a custom for safe conduct in an operation of this type, the Court would not substitute its judgment for that of the jury (194 F. 2d 194, 197).

On the same page in its opinion, the Court then justified the following inferences:

1. That after untying the line on the 53, he went ashore and crossed over the 58.

2. That since Johnson's duty was to remain aboard and tie together the bows of the floats, it was a more reasonable inference that he accidentally fell from the 58.

However, having made these logical conclusions and proper inferences, the court then on the first appeal, contends that there was nothing to show what caused him to fall (194 F. 2d at page 197). The argument is then made that the plaintiff's contention that the jury had a right to infer that he fell while loosening the line, "presupposes that

he did not shout the signal 'all gone'." The court then fell into an error, which we believe eventually led to the vitiating of both jury verdicts. To the plaintiff's argument that one of the bridgemen may have shouted "all gone", the Court of Appeals on the first appeal stated, that "no witness *observed* any bridgemen in the neighborhood" (194 F. 2d at page 197). That does not at all follow. The mere fact that no one *observed* bridgemen, does not mean that they were not there. Captain O'Brien said that bridgemen are always there, although he may not observe them (R. 159-160). The long racklines are removed by bridgemen (R. 96-97, 435). Having arrived at this erroneous conclusion, the Court stated that it was "at least equally reasonable to infer that Johnson did give the signal for the tug to start, and thereafter stumbled or for some other unknown cause, fell and knocked himself unconscious" (194 F. 2d 197).

Taking the position that when this Court ordered a new trial, it was for the purpose of correcting the fault found by the Court of Appeals on the first trial, plaintiff not only made clearer the possible source of the "all gone" signal, but added entirely new testimony as to the unsafe condition of one of the floats. We believe that the Court of Appeals in its first review was in error on the question of cause and effect by failing to appreciate the presence of bridgemen. Nevertheless, the court below, on the second review, compounded the original error by not only repeating the first error, but by totally ignoring the additional testimony which gave great weight to the question of causal relationship.

In attempting to justify that there was no causal relationship between the negligence and Johnson's death, the courts below found that it may well have been Johnson that gave the all-important signal. That of course was an inference without any basis in fact. Furthermore, that would mean that the deceased did something that brought about his own death.

In all death cases, particularly those under the F.E.L.A. as well as under the Jones Act, there is a presumption that the deceased acted diligently and properly (*Tennant* v. *Peoria & P. Ry. Co.*, 321 U. S. 29 at page 34). This presumption is more than an idle legal principle. It means that this experienced floatman did not give an "all gone" signal before everything was ready. It means that this experienced floatman was attending to his business in the usual and customary way, and we are told that the usual and customary method is to *give a signal only when all lines are clear* (193). Thus the jury's inference has greater support in reason and in logic than the court's. Even if the jury and court had an equal right to make a reasonable inference the court's action in setting aside the jury's finding is a substitution of its finding for that of the jury.

There is no justification in reason or authority that compelled the jury to accept the judge's inference. This Court in *Wilkerson* v. *McCarthy*, 336 U. S. 53, criticizes such an attempt as an "independent resolution of conflicting testimony", and in *Tennant* v. *Peoria and P. Ry. Co.*, supra, at page 35, this Court in referring to such an inference by the Appellate Court characterizes it as suffering from "*the same lack of direct proof as characterizes the one adopted by the jury*".

(3) The Court of Appeals failed to give due weight to the declared policy of this Court that in cases under the Federal Employers' Liability Act and Jones Act the right of trial by jury should be particularly guarded.[4]

Congress, in the Jones Act (46 U. S. C. Sec. 688), adopted the same standard of care as was provided for under the

[4] Jones Act cases have uniformly been treated with the same philosophical concept as F.E.L.A. cases. This Court has even gone further in recognizing seamen as wards of the Admiralty. In a number of cases it has been the declared policy of this Court that wherever there was patent error in the lower court's decisions in setting aside verdicts, or in dismissing complaints involving the

Federal Employers' Liability Act. That Act specifically provides that the carrier shall be liable if the negligence "in whole or in part" contributed to the injury or death. The right of trial by jury should be just as zealously guarded in actions by seamen under the Jones Act as it is in the F. E. L. A. cases. If anything, by virtue of the nature of their work, it should be more so. It was pointed out by this Court that the Jones Act enlarged the remedies heretofore available to seamen. *Panama Railroad* v. *Johnson*, 264 U. S. 375; *Garrett* v. *Moore-McCormack*, 317 U. S. 239.

There have been many cases here, where this Court announced again and again its declared policy in F. E. L. A. cases. Succinctly stated, it has been said that to deprive railroad workers of the benefit of a jury trial in close or doubtful cases, is to take away a goodly portion of the relief which Congress has afforded them. *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350; *Blair* v. *Baltimore & Ohio R. R.*, supra; *Wilkerson* v. *McCarthy*, supra.

This Court in *Lavender* v. *Kurn*, 327 U. S. 645 at pages 652 to 653, stated that it is an undue invasion of the jury's historic function for an appellate court to weigh conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury. *It was in that case that this Court made the realistic observation that all jury verdicts involve some measure of speculation and conjecture.*

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interpretation of the Federal Employer's Liability Act, the Supreme Court has been unusually liberal in granting petitions for certiorari where the petitioner was the plaintiff (*Wilkerson* v. *McCarthy*, 336 U. S. 53; *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U. S. 207; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 354, 358). The liberal practice of the Supreme Court has been founded on the principle that it is important to preserve to these litigants their right to a jury trial (*Wilkerson* v. *McCarthy*, supra, at pages 68-71).

In *Carter* v. *Atlanta etc. R. Co.*, 338 U. S. 430, 431, the Court stated the policy as follows: "Our duty to review certain cases of this nature is settled."

In its effort to preserve the jury trial, the Supreme Court in a case not involving death, held that the question of causal connection was one for the jury, and overruled the holding of the Court of Appeals for the Fifth Circuit (170 F. 2d 719). That was in the case of *Carter* v. *Atlanta, etc., Ry. Co.*, 338 U. S. 430. The Court held that if the injury to the railway employee resulted "in whole or in part" from defendant's negligence or its violation of the Safety Appliance Act, then it is a question for the jury to determine as to whether causal relationship existed. In *Corey* v. *Southern Pacific R. Co.*, 335 U. S. 520, the Court held that the jury may determine whether the negligent breach is "a contributory proximate cause".

More recently, November 8, 1954, this Court in *McAllister* v. *U. S.*, 347 U. S. 932, reversed the Court of Appeals of the Second Circuit and restored the decision of the District Court upon the question as to whether or not the District Court was justified in finding causal relationship of the seaman contracting poliomyelitis because of the vessel's negligence in pulling into a port where that disease was raging.

Here, the lower Court invaded the jury's exclusive function. Congress has chosen the jury as the proper tribunal to assess and evaluate the facts. *Bailey* v. *Central Vermont Ry. Co.*, supra, at page 354, and *Berry* v. *U. S.*, 312 U. S. 450.

In *Ingersoll* v. *Liberty Bank of Buffalo*, supra, p. 8, the following quotation is pertinent here:

> "The existence of remote possibilities that factors other than the negligence of the defendant may have caused the accident does not require a holding that plaintiff has failed to make out a prima facie case. It is enough that he shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred. Stubbs v. City of Rochester, 226 N. Y. 516, 124 N. E. 137, 5 A. L. R. 1396."

Similar expressions will be found in *Tennant* v. *Peoria & P. Ry. Co.*, supra; *Tiller* v. *Atlantic Coast Line R. Co.*, supra, where the defendant had urged that the cause of death was speculative and conjectural, and where the Supreme Court held that that was a question peculiarly within the province of the jury, citing *Sadler* v. *Penn. R. R.*, 159 F. 2d 784, and *Johnson* v. *Griffiths S. S. Co.* (9th Cir.), 150 F. 2d 224. In the *Sadler* case Circuit Judge Parker held:

> "While it is impossible to say with certainty what caused decedent to fall between the barges, it is a reasonable inference from the evidence, that in attempting to go from one to the other, he fell between them, as a result of the defective lighting. There is nothing to indicate that he was shoved or pushed overboard or that he was intoxicated or that he was attempting to commit suicide. Under such circumstances the cause of the fall can no more be said to be speculative than in the case of a man found in the hold of a vessel beneath an unguarded hatch, as in the case of *Johnson* v. *Griffiths S. S. Co.* (9th Cir.), 150 F. 2d 224."

The above language has striking significance to the present appeal.

It was therefore error for the District Court to set aside the jury's verdict and make its own findings and inferences, and for the lower court to sustain the action of the District Court.

The lower court's invasion of the jury's exclusive function, particularly in death cases involving the question of causal relationship, will tend to raise havoc with so many cases, where harbor workers come to their death because of defective equipment or other negligent conduct, without eyewitnesses being present. There are many such cases where causal connection can only be based upon inference. Many of these accidents, in which claims are prosecuted are never

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officially reported. The decision of the lower court will tend to negate the forward steps of liberal construction of this Court in the *Jones Act* cases.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Court should exercise its right of review and grant this petition for a writ of certiorari.

Respectfully submitted,

JACQUIN FRANK,
Counsel for Petitioner.

JACQUIN FRANK,
HERMAN B. GERRINGER,
on the Brief.

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FILED
MAY 4 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 770

MARGARET JOHNSON, as Administratrix of the Goods, Chattels and Credits of CHARLES JOHNSON, deceased,
Petitioner,

against

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACQUIN FRANK,
Counsel for Petitioner.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 88—OCTOBER TERM, 1954

Argued January 10, 1955 Decided February 7, 1955

Docket No. 23209

MARGARET JOHNSON, as administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Plaintiff-Appellant,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant-Appellee.

Before CLARK, Chief Judge, FRANK and HINCKS, Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York setting aside a jury verdict in favor of the plaintiff and directing judgment for the defendant under Rule 50(b) of the Federal Rules of Civil Procedure. Clarance D. Galston, Judge. *Affirmed.*

DAVID M. FINK and JACQUIN FRANK, for *plaintiff-appellant.*

EDWARD R. BRUMLEY (R. M. PEET, of counsel) for *defendant-appellee.*

PER CURIAM.

The case in its present posture is free from the procedural defects for which the prior judgment was reversed in *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48.

Affirmed on the opinion of Judge Galston.

Judgment of Affirmance.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of February, one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
Circuit Judges.

MARGARET JOHNSON, as Admnx., etc.,
Plaintiff-Appellant,

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

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On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion of Judge Galston.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. Daniel Fusaro,
Clerk.